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Symposium—Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development

The Role of Judicial Independence

*Brian K. Landsberg**

I. A DEFINITION FOR JUDICIAL INDEPENDENCE

Papers today from scholars and prominent high court judges reflect enormous breadth in describing judicial independence. I believe that if one begins to talk about the effect of “judicial independence” on economic development, there should be an agreement on the definition of that term. It is not clear to me that the papers contain such a definition. They do state a number of factors that people think are relevant to judicial independence. It seems that two kinds of definitions may have emerged: an institutional-type definition, and a performance-based definition.

A. Institutional-type Definition of Judicial Independence

One definition of judicial independence may be referred to as an institutional definition: a judge’s immunity from external pressures. This is the position that is taken in Daniel Klerman and Paul Mahoney’s article. In brief, the article states:

A fully independent judiciary is one in which judges enjoy tenure during good behavior, a salary sufficient to shield them from pressure from either government or private parties, sufficient prestige that the hope of promotion to a more prominent post is not a large motivator, a system of perquisites . . . that is hard for the government to manipulate, and rules regarding jurisdiction over cases that are resistant to executive and legislative meddling, among others.¹

Today’s papers embrace aspects of this definition of judicial independence.

Professor Klerman also referred to the definition of judicial independence proffered by Feld and Voigt as “the amount of discretion that judges have at their disposal vis-a-vis representatives of other government branches.”² This definition emphasizes the horizontal separation of powers among coordinate branches of government.

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1. See Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth Century England*, 7 AM. L. & ECON. REV. 1, 2-3 (2005).

2. See Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators* (CESifo Working Papers No. 906 at 3, 2003), available at <http://ssrn.com/abstract=395403>.

Both Justice Jing Liu and Deputy President Sam Rugege have raised the question of how the tradition of coordination in their countries relates to judicial independence.

In addition, Wang Juan has raised another structural or institutional type of issue, namely independence within the judicial system, or what might be called vertical independence. What implications arise when a lower court seeks advice from a higher court? That seems to be an interference with judicial independence. But to some extent, does it depend on whether systemic independence or individual judges is at issue? The papers seemed mixed on this point—some talk about a system of judicial independence, and others talk about how individual judges act. Certainly, a lower court judge who is seeking advice from a higher court is not going to feel independent after receiving that advice. But, does that mean the system is not one of judicial independence?

Another structural issue pinpointed by Judge Callahan concerned the U.S. Supreme Court's review of *Marbury v. Madison*;³ so, when judicial independence is discussed in this country, this entails the independence to decide the constitutionality of controversial issues. Cases like *McCullough v. Maryland*⁴ and *Dred Scott v. Sandford*⁵ were certainly controversial, and judges were vetted for how they felt about those cases during their judicial confirmation. But, how does the very political nature of the appointment and confirmation process in the United States affect the notion of judicial independence?

B. Performance-based Definition of Judicial Independence

The other kind of definition of judicial independence is a performance-based meaning: judicial independence is a function of a judge's behavior. The judicial system seeks judges who act neutral and base their actions on law and facts. There seems to be wide agreement with that proposition in the abstract. Relatedly, the judicial system also seeks predictability. Intuitively, one would think that economic actors would be more interested in predictability than any other aspect of judicial independence.

The one thing that the participants of the symposium⁶ seemed to agree on was that judicial independence does not mean freedom from all accountability. Justices Liu and Rugege mentioned the importance of having a code of ethics. Judge Callahan referred to this as internal accountability.

There are also a number of ways that the judicial system, as a whole, is held accountable. The power of the purse has been mentioned. For example, if the public shows disapproval of a judge's behavior, a number of repercussions may

3. 5 U.S. 137 (1803).

4. 17 U.S. 316 (1819).

5. 60 U.S. 393 (1857).

6. Symposium, Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development at the McGeorge School of Law (October 28, 2005).

result, such as freezing a judge's salary, reducing a judge's support staff, or limiting the number of judicial positions, which may create jams in the court system. Consequently, a lot can be done to make life miserable for judges.

Another way of determining what is meant by judicial independence is to ask why such independence is wanted, and see if a definition comes from that direction. Once that question is answered, the definition of judicial independence should be ascertained.

II. JUDICIAL INDEPENDENCE: ECONOMICS, PREDICTABILITY, AND NEUTRALITY

Do economic actors want neutrality, or would they be satisfied with predictability? Once matters have deteriorated to the point that parties have to go to court, every economic actor wants the court to rule in its favor more than it wants neutrality. While predictability may help economic actors make rational investment decisions, anti-investment courts would discourage, rather than encourage, some economic activity. So perhaps predictability and neutrality are linked to the definition of judicial independence. If judges really are neutral, then litigants should be able to look at the law and facts, and predict the outcome of a case in advance and should not have to go to court. They ought to be able to settle a case.

For many years, I worked in enforcement of the federal civil rights laws in the deep South, and I could certainly predict what some judges were going to do; it was not pretty. Many judges were predictable. They would virtually always rule against the person seeking vindication of the right to be free from discrimination. Even though they were predictable, these judges certainly were not neutral. It is worth noting that prior to the 1970s, the deep South was at the bottom of the economic rung in this country. The economy of that region has improved markedly since then. Is this improvement possibly linked in part to the fact that the end of the segregation era has freed judges to become more independent?

Deputy President Rugege underscored a very important point about the economic issue that confronts underpaid judges. The American Bar Association Journal published a story a few years ago about a U.S. federal judge who went to Cambodia to lecture on corruption. He went to a provincial court to discuss how terrible corruption was. After he finished his talk, one of the provincial judges raised his hand and asked the judge his salary, and the federal judge told him. U.S. federal judges make a living wage with pretty good perks and the federal judiciary attracts very highly-qualified candidates. By contrast, the Cambodian provincial judge said he could not feed his family on his salary. It is important to stress that there will be no judicial independence as long as judges have to determine how to support their family. The answer, of course, is pretty clear. If these judges are not getting paid by the state, they are going to get their money elsewhere. Anyone would do that for his or her family.

It is also predictable that a judge whose decision depends upon the good graces of the government is going to rule in favor of those who are in power. Perhaps in thinking about judicial independence and economic development, the analysis should split between cases involving the government and cases between private actors. It seems conceivable that even in a system where the courts are not independent vis-a-vis the government, they could be independent vis-a-vis private actors. That is, the government may, in order to promote economic development, wish to have most economic development cases decided neutrally.

At the same time, however, the government may wish to maintain tighter control over other types of cases. For example, in times of crisis, all governments are prone to impose stricter controls on human behavior and even seek judicial cooperation in doing so. Additionally in one-party states, the party will want the courts to help stamp out challenges to its hegemony. This was the case, for example, in the deep South through the middle of the twentieth century. There are many signs that this is the case in modern China. Conversely, one might argue that a court is either independent or not, and there is no in-between.

A court system may be also neutral without being entirely predictable. Predictability depends in part on a system of precedent. If a court decides each case without reference to what has happened in other courts or cases, predictability suffers. Predictability also requires a measure of judicial competence. Incompetent judges are unlikely to be up to the task of fully understanding the facts and the law (even in simple cases), and certainly are not capable of unraveling complex economic transnational issues.

What is meant by neutrality? Here, one might turn to a set of principles from the United Nations. The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Defendants adopted three basic principles regarding the independence of the judiciary, which were endorsed by the General Assembly in 1985 in two different resolutions. The first basic principle says that “[t]he independence of the judiciary shall be guaranteed by the state and enshrined in the constitution or the law of the country.”⁷ I gather that this is the case in most countries. That is what Judge Rugege referred to as *de jure* independence. The next basic principle declares: “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”⁸ Moreover, the third principle states that “[t]he judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”⁹

7. See e.g., Joseph Kahn, *When Chinese Sue the State, Cases Are Often Smothered*, NY TIMES, Dec. 28, 2005 at A1.

8. *Id.*

9. *Id.*

Note that these principles not only apply to structure, but also to what courts actually do—they must act impartially. These principles require courts to have jurisdiction over all issues of a judicial nature. In the United States, the executive or legislative branch has attempted to remove some matters from the jurisdiction of the judiciary. In China, issues concerning the constitutionality of statutes are not decided by the courts; they are decided by the Council of the People's Congress. These issues are not supposed to be decided by the courts. Does that mean that there is no judicial independence? Not necessarily. Courts may be independent enough to decide other issues even if they are not independent as to those issues. The jurisdiction of independent courts over the constitutionality of government action seems central to the concept of the rule of law. So the question is whether there can be judicial independence without rule of law.

One final point emerges from Judge Callahan's remarks: the distinction between judicial independence and a lack of accountability. Judges are, at the very least, accountable to the law. As Justice Cardozo explained, "[t]he judge, even when he is free, is still not wholly free."¹⁰ A judge must internalize the traditions of proper adjudication. Accountability to the law presupposes transparency, which promotes both neutrality and predictability. Lower courts are also accountable to appellate courts. An independent judiciary may include layers of appellate review that take away the independence of lower court judges. Electoral accountability is more problematic. Can it be said that a judge whose ability to be re-elected depends on how she rules on a controversial issue is independent?

III. CONCLUSION

In short, judicial independence can be generally defined in terms of freedom—indeed responsibility—to rule based on the facts and the law, and thus free from undue external restraints. This definition of judicial independence can accommodate both common law and civil law traditions. But within that definition lurks many ambiguities. As scholars seek to determine the link, if any, between judicial independence and economic development, they need first to develop a solid definition of judicial independence. The papers delivered at this conference provide a solid base for doing so.

10. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (Yale University Press 1921).
